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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1328

BOROUGH OF DOYLESTOWN
Petitioner

v.

DONALD BRADSHAW, ALFRED CUNEO AND CAROLE CUNEO, BRUCE D. RAWLINGS, DELAWARE VALLEY COLLEGE, MARJORIE E. MOYER t/a SUNNY BEVERAGES AND MAENNERCHOR SOCIETY
Respondents

BRIEF FOR RESPONDENT DELAWARE VALLEY COLLEGE IN OPPOSITION

On Petition For a Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in reversing the judgment against Delaware Valley College on the ground that the evidence was legally insufficient to sustain a finding that the College had a duty to supervise an off-campus college-related class picnic to prevent the drinking of beer by the students?

2. Did the Court of Appeals err in sustaining the judgment against the Borough of Doylestown on the

ground that there was sufficient evidence to sustain a finding that Doylestown was negligent in failing to correct known dangerous and defective conditions in its street or in failing properly to warn of those conditions or to take alternative safety measures, and on the ground that the question of whether the driver's negligence was a superseding cause was a factual one properly left to the jury?

COUNTER-STATEMENT OF THE CASE

Plaintiff Donald Bradshaw, a nineteen year old sophomore student at Delaware Valley College, was severely injured on April 13, 1975, in Doylestown, Pennsylvania, while a backseat passenger in a small Saab automobile driven by a classmate, defendant Bruce Rawlings. The accident occurred as they were returning to the College from a sophomore class picnic held at a grove owned by the Maennerchor Society on the outskirts of the Borough of Doylestown. Rawlings drove through Doylestown along Union Street, colloquially known as "Dip Street" because it was constructed (in the 1920s) with deep perpendicular drainage dips instead of sewers to carry surface water runoff, and with an excessively steeply graded crown. Proceeding over the two parallel drainage dips in the roadbed of Union Street at its intersection with Harvey Avenue, Rawlings lost control of his car, which veered to the right and struck a full-sized parked car.

The intersection where the accident occurred was an especially hazardous one with a long history of incidents involving the undercarriages of cars striking the street surface causing parts of the cars to fall off or the cars to become disabled due to the severity of the dips. The uncontroverted expert testimony was that the dips were defective conditions presenting an unreasonable risk of harm to the motoring public, that the warning signs as to the hazard were inadequate, that an excessively high speed (35 m.p.h.) was authorized, and that Doylestown could have easily corrected the dangerous and defective condition of the intersection by the installation of simple culverts eliminating the dips, or by other safety measures.

The picnic, which was not held on College grounds, was an annual activity of the College class. The faculty member who served as the sophomore class advisor participated with the class officers in planning the picnic and co-signed a check for class funds which was later used to purchase beer. The advisor was unable to attend the picnic and did not get another faculty member to attend in his place. The presence of a faculty advisor at class social events was encouraged but not mandated by the College. Flyers announcing the picnic, which were mimeographed by the college duplicating facility and featured drawings of beer mugs, were prominently displayed around the campus. Approximately seventy-five students attended the picnic and consumed most of six or seven half-kegs of beer, which had been purchased from defendant Marjorie Moyer trading as Sunny Beverages. There was no problem of intoxication with any classmates attending the picnic.

Rawlings consumed between three and six mugs of beer during the several hours the picnic lasted. Although there was no evidence that Rawlings was driving in an abnormal manner at the time of the accident and the evidence of the experts, police, emergency room doctor, and most of the eyewitnesses (including Bradshaw himself) was that Rawlings was not intoxicated or unfit to drive, there was other evidence, concerning Rawlings' circling the picnic grounds before driving off and the opinion of another passenger in his car, on the basis of which the jury found he was under the influence of alcohol.

The great majority of the students drinking beer at the picnic were sophomores of either nineteen or twenty years of age. The legal drinking age in Pennsylvania is

twenty-one years. The College's applicable parietal rule, contained in the student handbook, provides:

> "Possession or consumption of alcohol or malt beverages on the property of the College or at any College sponsored or related affair off campus will result in disciplinary action. The same rule will apply to every student regardless of age." (App. 726a-727a)

That regulation, which applies to all students regardless of age, was enforced only with respect to on-campus beer drinking (through disciplinary hearings sometimes resulting in short suspensions), but was not enforced with respect to off-campus beer drinking on the stated grounds that it would be unrealistic to attempt to police such off-campus activities of students who are adults for all practical purposes and who range in age from eighteen to twenty-five (App. 748a-752a) and also that enforcement of the regulation would have been very difficult because of the College's location a mere ten miles from New Jersey, where the legal drinking age was eighteen. Approximately half of the student body, including Bradshaw, were from New Jersey.

In the first phase of the bifurcated trial of this action, the jury found defendants Bruce Rawlings, Borough of Doylestown, Delaware Valley College and Marjorie E. Moyer t/a Sunny Beverages liable to the plaintiffs, but found no liability on the part of defendant Maennerchor Society. During the trial on the issue of damages, the jury awarded to plaintiff Donald Bradshaw a total of $1,108,067 in damages, and to his mother and stepfather $5,000 each. Motions for judgment notwithstanding the verdict and for new trial were filed by those defendants found liable, as were plaintiffs' motion for a new trial limited to damages only. Defendant Rawlings withdrew his post-trial motions prior to the Court's disposition of them. All post-trial motions were denied. The District Court's opinion is reported at 464 F. Supp. 175 (E.D.Pa. 1979).

On appeal to the United States Court of Appeals for the Third Circuit, where the Pennsylvania Association of Colleges and Universities and the American Council on Education were permitted to participate as *amici curiae*, Delaware Valley College argued primarily that "the College had no legal duty to supervise the class picnic so as to prevent any drinking of beer" (College's Brief in Court of Appeals 12) and that "there is no sufficient evidence that the College had any duty of supervision whatsoever over the picnic." (Id. 19)

The Court of Appeals affirmed the judgment of the District Court in all respects except that part imposing liability against Delaware Valley College, which they reversed and directed the entry of a judgment in favor of the College on the ground that Bradshaw failed to present sufficient evidence that the College owed him a duty for the breach of which it could be held liable in tort. The Opinion of the Court of Appeals is set forth in the Appendix to the Petition for Writ of Certiorari at page A-1.

REASONS FOR DENYING THE WRIT

I. THE ONLY MATTER BEFORE THIS HONORABLE COURT RELATES TO THE SPECIFIC DECISION BELOW.

It would obviously be inappropriate for counsel for respondent in the instant case to defend the Supreme Court of the United States against counsel for petitioner's broad, general charges of failing to supervise and control adequately the District Courts and Courts of Appeals in their function of determining and applying state law in diversity cases. It would similarly be inappropriate for respondent's counsel to respond to petitioner's general critique of the techniques used by the several Courts of Appeals in determining applicable state law in such cases. Restricting ourselves to the petition in the particular case now under consideration, we submit that the decision below, which turns on its own facts, was right and petitioner has failed to present any sound reasons for its review.

II. THE COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY DECIDED THAT PLAINTIFF FAILED TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH THAT THE COLLEGE OWED HIM A DUTY FOR THE BREACH OF WHICH IT COULD BE HELD LIABLE IN TORT.

Plaintiff Bradshaw tried his case against the College on the assumption, which the trial judge adopted, that the College had a duty of care toward members of the sophomore class attending a college-related off-campus picnic — a protective, custodial duty to prevent any drinking of beer by the mostly nineteen and twenty year old students. The trial judge charged the jury that "the college owes a duty to use due care under the circumstances to prevent an unreasonable risk of harm to sophomores who attend a class function." *Bradshaw v. Rawlings*, 464 F. Supp. 175, 181 (E.D. Pa. 1979). But it

was Bradshaw's burden (which he failed to meet) to prove the existence of a duty owed to him by the College as a necessary precondition to his right to prove the breach of such a duty. Judge Aldisert stated in his opinion below:

> "The centerpiece of Bradshaw's argument is that beer-drinking by under-age college students, in itself, creates the special relationship on which to predicate liability and, furthermore, that the college has both the opportunity and the means of exercising control over beer drinking by students at an off-campus gathering. These contentions miss the mark, however, because they blur the distinction between establishing the existence of a duty and the breach thereof. Bradshaw does not argue that beer drinking is generally regarded as a harm-producing act, for it cannot be seriously controverted that a goodly number of citizens indulge in this activity." (Petition A-14)

In an attempt to prove the existence of a duty owed him by the College, Bradshaw concentrated on the College regulation imposing sanctions on the use of alcohol by students regardless of age. Although Bradshaw did not spell his theory out, by implication his contention is that by the mere promulgation of that regulation the College had voluntarily assumed a custodial duty toward him which extended to an off-campus class picnic, even though the regulation had never been enforced with respect to the drinking of alcoholic beverages by students at such off-campus affairs. We submit that in its opinion below the Court of Appeals correctly rejected this contention, holding:

> ". . . A college regulation that essentially tracks a state law and prohibits conduct that to students under twenty-one is already prohibited by state law does not, in our view, indicate that the college voluntarily assumed a custodial relationship with its

students so as to make operative the provisions of §320 of the Restatement (Second) of Torts . . ."

> "Thus, we predict that the Pennsylvania Courts would not hold that by promulgating this regulation the college had voluntarily taken custody of Bradshaw so as to deprive him of his normal power of self-protection or to subject him to association with persons likely to cause him harm. Absent proof of such a relationship, we do not believe that a prima facie case of custodial duty was established in order to submit the case to the jury on this theory." (Petition A-12)

Moreover, Bradshaw also failed to meet his burden of proving that the college "either [had] a duty to control the conduct of a student operating a motor vehicle off campus or a duty to extend to a student a right of protection in transportation to and from off campus." (Petition A-12)

In *Manning v. Andy*, 454 Pa. 237, 310 A. 2d 75 (1973), the Supreme Court of Pennsylvania held that a private host who supplies intoxicants to a visibly intoxicated guest may not be held civilly liable for injuries to third parties caused by the intoxicated guest's negligence. In the instant action, since there was no problem with intoxication, according to the uncontradicted testimony in Bradshaw's own case (App. 211a), there was no supplying of beer to any visibly intoxicated person at the picnic. The Court below, stating that there was no Pennsylvania decision on the precise issue raised in the instant case, concluded:

> "Because the Pennsylvania Supreme Court has been unwilling to find a special relationship on which to predicate a duty between a private host and his visibly intoxicated guest, we predict that it would be even less willing to find such a relationship between a college and its student [on which to predicate a duty on the College either to control Rawlings' conduct or to protect Bradshaw from possible harm] under the circumstances of this case." (Petition A-13)

The decision of the Court below is consistent with the decisions of the New York courts, which have also refused to impose liability upon an institution of higher learning under somewhat similar circumstances. See e.g., *Rubtchinsky v. State University of New York*, 46 Misc. 2d 679, 260 N.Y.S. 2d 256 (1965). (Petition A-15)

Petitioner repeats several times his inaccurate contention that at the trial and on appeal "the College argued only that it had no duty to supervise the picnic because that duty only applied where the activity itself was inherently dangerous." (Petition 13; *Rubtchinsky v. State University of New York*, 46 Misc. 2d 679, 260 N.Y.S. 2d 256 (1965). The obvious corollary of that proposition, under the circumstances of the instant case,[1] is the basic position maintained by the College throughout this litigation that Bradshaw failed to present sufficient evidence to establish that the College owed him a duty (to prevent beer drinking at a sophomore class picnic) for the breach of which it could be held liable in tort. (Petition A-5; College's Brief in Court of Appeals 12-23; *Bradshaw v. Rawlings*, 464 F. Supp. 175, 181 (E.D. Pa. 1979)).

In an opinion carefully analyzing applicable Pennsylvania law, the Court of Appeals agreed with the College's position and, we submit, correctly decided "that Bradshaw failed to establish a prima facie case against the College that it should be charged with a duty of custodial care as a matter of law and that the district court erred by submitting the case to the jury." (Petition A-16)

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1. Bradshaw made no attempt to prove that beer-drinking at a class picnic was an inherently dangerous activity or even was, in the words of Judge Aldisert, "a harm-producing act". (Petition A-14)

III. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE QUESTIONS OF NEGLIGENCE AND CAUSATION RELATING TO THE BOROUGH OF DOYLESTOWN WERE FACTUAL ONES PROPERLY SUBMITTED TO THE JURY.

The uncontradicted evidence in this case was overwhelming in establishing that the drainage dips in Union Street, also known as "Dip Street", constituted dangerous and defective conditions well known to the borough officials of Doylestown for many years prior to the accident. Whether Doylestown was negligent in failing to correct those defective conditions was a question of fact properly submitted to the jury. Indeed, the very Pennsylvania cases cited by petitioner in support of his contention that a municipality is not liable for conditions incorporated in the initial design or construction of a street unless the design or construction is improper at that time (Petition 21), more significantly stand for the proposition that "[w]hen defects are brought to their [i.e., public officials'] attention, necessary changes must be made, and the highway closed in the meantime if there is apparent danger." *Travers v. Delaware County*, 280 Pa. 335, 338-9, 124 Atl. 497, 498 (1924).

We submit that the questions of Doylestown's negligence, predicated on theories of failure properly to maintain the street by correcting dangerous and defective conditions, failure properly to warn of the existence of the dips, and failure to take alternative safety measures, were all questions of fact properly left to the jury. The question of whether Rawlings' negligence was a superseding cause was also a factual one properly submitted to the jury for resolution. *Estate of Flickinger v. Ritsky*, 452 Pa. 69, 75, 305 A. 2d 40, 43 (1973).

Accordingly, we submit that the Court of Appeals correctly decided the question of liability on the part of Doylestown by the proper application of Pennsylvania state law.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the decision of the Court of Appeals was correct, that petitioner has presented no valid reasons for review, and that therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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